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No. 151

In the

Supreme Court of the United States

October Term 1958

CATHERINE A. LIETZ,

Petitioner.

vs.

ARTHUR S. FLEMING, Secretary of Health, Education and Welfare, Social Security Administration of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROWLAND W. FIXEL
Attorney for Petitioner
2163 Penobscot Building
Detroit 26, Michigan

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Catherine A. Lietz, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered April 9, 1959 after application for rehearing was refused.

OPINIONS BELOW

The opinion of the court below was dated March 3, 1959, was filed March 3, 1959, and is reported in 264 F

2d 311. The opinion on rehearing was filed April 9, 1959, has not yet been reported and for convenience is printed in an appendix filed with this petition, and there is also printed in said appendix a copy of the opinion of the administrative agency involved.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

QUESTION PRESENTED

The question presented in this petition is whether Section 202 (e). (1) of the Social Security Act, 42 U S C 402, which grants survivors insurance benefits to widows of "fully insured individuals" who died after 1939, prevents the payment of survivor's insurance benefits under 42 U S C 415 (note), 68 Stat. 1084, 83rd Congress, 2d Session, 1954 to petitioner whose husband died May 17, 1938, and who at time of death was not fully insured but who had six quarters of coverage.

STATUTES INVOLVED

Three federal statutes set forth in (1), (2) and (3) below are involved:

(1) 42 USC 402, which defines a widow, for purposes of widows Insurance benefits under the Social Security Law, as

> "The widow of an individual who died a fully insured individual after 1939 * * *"

(2) 42 USC 415 (note) (Supp II) (App 5a-6a), the 1954 amendment, which provides in pertinent part in sub-section

(a) for "benefits in certain cases of death before September 1950 as follows:

> "In the case of any individual who died prior to September 1, 1950, and was not a fully insured individual * * * when he died, and who had not less than six quarters of coverage * * * such individual shall * * * be deemed to have died a fully insured individual."

In sub-section (b) of the same statute it is provided that:

> "The provisions of subsection (a) shall be applicable only in the case of monthly benefits under Sec. 202 of the Social Security Act for months after August 1954, on the basis of applications filed after such month."

(3) 42 USC 415, in pertinent part as it read prior to the 1954 amendment referred to in (2) above, provided that:

> "In the case of any individual who died prior to September 1, 1950, the term "fully insured individual" means any individual who had not less than one quarter of coverage (whenever acquired) for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever is later, and up to but *excluding* the *quarter in which he* attained retirement age, or *died*, whichever first occurred, except that in no case shall an individual be a fully insured individual unless he has at least six quarters of coverage." (Italics ours)

STATEMENT OF MATERIAL FACTS

Petitioner is the widow of her decedent husband, who died May 17, 1938. Petitioner's decedent had six quarters of coverage, namely four quarters in 1937 and two quarters in 1938.

Petitioner's claim to monthly social security benefits is predicated on Public Law 761, found in 42 USC 415 (note) (Supp II) (App 5a-6a), an amendment in 1954 to the Social Security Laws, which created a fully insured status retroactively in those decedents who died before September 1950, who had six quarters of coverage, but who did not die fully insured.

The basis for federal jurisdiction in the court of first instance was Sec. 205 (g) of the Social Security Act, as amended (Sec. 405 (g) Title 42, U. S. Code).

The Circuit Court of Appeals for the Sixth Circuit took the view that the provision in 42 USC 402 requiring a decedent to have died fully insured after 1939, precluded recovery by petitioner under 42 USC 415 (note) (Supp II) (App 5a-6a), the amendatory law of 1954, and in its decision indicated that the only pertinent provision of the 1954 law was sub-section (a), which redefined a "fully insured individual."

Petitioner filed a petition for rehearing in the court below. Whereupon, in denying the petition for rehearing, the lower court held that in any event, petitioner could not avail herself of the provisions of the 1954 amendment, as her decedent died with six quarters of coverage and consequently was fully insured when he died.

REASONS FOR GRANTING THE PETITION

(a). The Circuit Court of Appeals for the Sixth Circuit reached an incorrect conclusion that because petitioner's decedent had six quarters of coverage when he died in 1938, that he was fully insured, and being fully insured petitioner can take no advantage of the amendment of 1954 to 42 USC 415.

If six quarters of coverage (prior to the 1954 amendment) in itself created a fully insured status, Congress

would have had no reason to amend 42 USC 415 to create a fully insured status, in cases where a decedent died prior to September 1950 and *had six quarters of coverage, but died not fully insured.* It is solely by reason of the 1954 amendment that petitioner can now claim a retroactive fully insured status for her husband who prior to the 1954 amendment, had only been credited five quarters out of six quarters earned, toward such fully insured status, under 42 USC 415.

(b). The decision of the Circuit Court of Appeals was likewise incorrect in the conclusion reached that the pertinent part of the amendatory law merely redefined the status of a fully insured individual. The lower Court failed to include in its decision or in the foot-note of the printed decision of the case as it appears in 264 F 2d 311, sub-section (b) of the amendatory law, which made the new fully insured status applicable in the case of monthly benefits under the Social Security Law, after August 1954. (See 68 Stat. 1084, 83rd Congress, 2d Session, 1954, where sub-section (b) appears as part of the 1954 amendment.)

The purpose of 42 USC 415 *as amended* was to provide monthly benefits to aged widows whose husbands died *not fully insured* prior to September 1950, *but who had six quarters* of coverage, as was the case with petitioner's decedent. Nowhere in the amendatory law is there any language to the effect that such new benefits were restricted to cases where the husband died after 1939.

The emphasis placed by the lower Court on a statement in a Senate report that the purpose and effect of the amendatory law was to benefit aged widows whose husbands died after 1939 and prior to September 1, 1950, is a reference to a statement made in error in said report. The statement referred to in the Senate report No. 1987 of the 83rd Cong. 2d Session, is found under a heading "Summary of Principal Provisions of the Bill."

As the bill did not contain either originally or in its final form, any provision that benefits would be limited to those who died after 1939, the reference in the Senate report was without foundation and was merely an interpolation. As such it has no bearing on the legislative history of the bill and in no way militates against petitioner's contention. The erroneous statement in said report was explained to the lower court in argument and in petitioner's briefs.

A correct statement of that portion of the bill is found in House Report 1698 83rd Cong. 2nd Session under the heading: "Summary of principal provisions of the bill" and the sub-heading "Eligibility for benefits" as follows:

> "Benefits would be paid to the surviving aged widow, widowed mother, and children, or parents of any individual who died prior to September 1, 1950, and had at least 6 quarters of coverage."

Congress, under the 1954 amendment, in effect, created a new category of beneficiaries. It made the status of those decedents who died prior to September 1950 *not fully insured, but who had six quarters of coverage*, "applicable in the case of monthly benefits," and it left the category covered in 42 USC 402, namely those who died fully insured after 1939, without change. These are two separate and distinct classes of beneficiaries and both should be and must be given the benefit of the explicit and unambiguous language of the two separate Congressional enactments.

The effect of the lower court's decision is to limit the category of beneficiaries under 42 USC 415 as amended, by judicially inserting in the amendment a requirement that death had to occur after 1939.

To sanction such an insertion would be tantamount to judicial legislation.

RELIEF SOUGHT

Wherefore it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

ROWLAND W. FIXEL
Attorney for Petitioner
2163 Penobscot Building
Detroit 26, Michigan

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided March 3, 1959.)

(Filed March 3, 1959.)

(CAPTION OMITTED)

Before MILLER, Circuit Judge, WEICK and GOURLEY, District Judges.

GOURLEY, District Judge. This is an appeal from the refusal of the district court to review a final decision of the Secretary of Health, Education and Welfare disallowing appellant's application for Widow's Insurance Benefits under provisions of the Social Security Act, as amended 42 U. S. C. 401 et seq.

This question is raised: Does Sec. 109 of 1954 Amendments to Social Security Act which redefines the term "fully insured individual" with respect to persons who died prior to September 1, 1950 repeal by implication the requirement of Sec. 202 (e) (1) that the "fully insured individual must have died after 1939"?[1]

[1] Section 109 of the 1954 Amendments to the Social Security Act, 42 U. S. C. 415, provides in pertinent part:

(a) In the case of any individual—

(1) who died prior to September 1, 1950, and was not a fully insured individual (under Title II of the Social Security Act), when he died, and

(2) who had not less than six quarters of coverage (as defined in such title), such individual shall, except for purposes of determining entitlement of a former wife divorced to benefits under section 202 (g) of the Social Security Act be deemed to have died a fully insured individual. Such individual's primary insurance amount shall be computed under subsection (a) (2) of section 215 of such Act. For the purpose of such computation, the provisions of Section 215 (d) (3) of such Act shall apply if such individual died a currently insured individual (under title II

Appellant claims survivors insurance benefits due as result of her husband's death May 17, 1938. Denial of said claim was based on the ground that appellant's decedent did not die after 1939, which was a condition precedent to entitlement to current benefits under Section 202 (e) of the Social Security Act.

Appellant bases her prayer for relief upon the proposition that the 1954 amendment not only provided a new criteria for determination of "fully insured" persons who died prior to September 1, 1950, but by implication deleted therefrom the requirement of death after 1939.

We are naturally most prone to liberally construe the Social Security Act in favor of the party seeking its bene-

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of such Act) and any other person was entitled on the basis of his wages to monthly benefits or a lump-sum death payment under section 202 of such Act; in all other cases the provisions of section 215 (d) (4) shall be applicable, except that such individual's closing date shall be the first day of the quarter in which he died. In the case of any such individual, the requirement in subsection (h) of section 202 of such Act that proof of support be filed within two years of the date of his death shall not apply if such proof is filed before September, 1956.

Title II of the Social Security Act, as amended, 42 U. S. C. 401 et seq., provides in pertinent part:

Section 202 (e) (1) The widow (as defined in section 416 (c) of this title) of an individual who died a fully insured individual after 1939, if such widow—

(A) has not remarried,

(B) has attained retirement age,

(C) (i) has filed application for widow's insurance benefits or was entitled, after attainment of retirement age, to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, or

(ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained retirement age,

(D) was living with such individual at the time of his death, and

(E) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of her deceased husband, shall be entitled to a widow's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: she remarries, dies, or becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of her deceased husband.

fits, and if any basis in law exists to grant relief, we would so construe the Act. *Carroll* v. *Social Security Board*, 128 F. 2d 876 (C. A. 7).

But three compelling reasons militate against reversing the judgment of the lower court:

(1) Statutory construction negates appellant's position that the two Acts are irreconcilable. The 1954 Act was directed toward the lowering of the periods of coverage but evidences no intention to alter the requirement that the decedent must have died after 1939.

The law is well settled that repeals by implication are not favored. Where two acts cover the same subject matter both should be given effect if possible. *Posadas* v. *National City Bank*, 296 U. S. 497. Furthermore, if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in effect. *United States* v. *Burroughs*, 289 U. S. 159. To repeal a prior act there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy. *United States* v. *Borden Co.*, 308 U. S. 188; *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945, 948 (C. A. 6).

In order for an amending statute to operate as a repeal of the earlier Act, the intention of the legislature to repeal must be clear and manifest; otherwise, the later Act is to be construed as a continuation of, and not a substitute for, the first Act and will continue to speak, so far as the two Acts are the same, from the time of the first enactment. *Posadas* v. *National City Bank*, *supra*.

We can find no irreconcilable conflict between the two provisions in question, but to the contrary we cannot but help conclude that said provisions are directed at different problems.

(2) The legislative history militates against appellant's contention, most glaringly brought into focus by the Senate Report.[2]

(3) Finally, promulgated regulations and interpretation by the Social Security Board are against appellant's contention.

The current regulation respecting widow's insurance benefits provides that a claimant is entitled to such benefits "if she: (a) Is the widow . . . of an individual *who died after 1939*, and who, at the time of such death, was fully insured . . ." 20 C. F. R., Sec. 404.319 (emphasis added). The regulation incorporating the 1954 change to Section 202 (e) (1) with respect to filing applications did not change the "after 1939" requirement, which has been in the regulations both before and since this time.

The court should be hesitant to set aside the Board's interpretation of an Act under which it functions unless the Act itself or the unambiguous legislative intent thereof is obviously misapplied. *McLaren* v. *Fleischer*, 256 U. S. 477, 481; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

For the foregoing reasons, the judgment of the district court is affirmed.

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[2] The Senate Report makes direct reference to the problem presented by this case. In discussing the purpose and effect of Section 109, the Report states (S. Rep. No. 1987, 83d Cong., 2d Sess. 4-5):

> 6. Eligibility for benefits.
>
> * * * * * * *
>
> (b) Benefits would be paid to the surviving aged widow, widowed mother, and children, or parents of any individual who died *after 1939 and prior to September 1, 1950*, and had at least 6 quarters of coverage. (Emphasis added.)

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REFUSING PETITION FOR REHEARING

(Filed April 9, 1959.)

Before MILLER, Circuit Judge, WEICK and GOURLEY, District Judges.

Since it is undisputed that Appellant's husband had earned six quarters of coverage pursuant to the Social Security Act when he died May 16, 1938, he was "fully insured" at time of his death, which by its express language rendered 42 U.S.C. 415 inapplicable to him.

The effect of the amending statute, as this court sees it, has been fully considered in this court's opinion of March 3, 1959, and no useful purpose could be served by consideration of appellant's petition for rehearing. Said petition is therefore refused.

WALLACE S. GOURLEY
District Judge
Sitting by Designation

DECISION OF REFEREE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY ADMINISTRATION
OFFICE OF APPEALS COUNCIL

Case No. C1-55
CLAIM FOR: Widow's Insurance Benefits

In the Case of
Catherine A. Lietz
(Claimant)
Henry C. Lietz
(Wage Earner)
364-05-2901
(Social Security Account No.)

Henry C. Lietz, the wage earner in this case, died May 16, 1938; having earned six quarters of coverage; and on July 13, 1956, Catherine A. Lietz, the wage earner's widow, herein known as the claimant, applied for a widow's insurance benefits under section 202 (e) of the Social Security Act as amended in 1954.

The Bureau of Old-Age and Survivors Insurance of the Social Security Administration, hereinafter mentioned as the Bureau, disallowed the claim because the wage earner died before 1940; and on September 18, 1956 the Bureau sent the claimant a letter to that effect. In all other respects she had qualified for the benefits sought. Disagreeing with that determination, the claimant requested a referee's decision without a hearing, saying: "Denial of my claim was based on provisions of Sec. 202 (d) (1) of the Social Security Act effective January 1, 1940, whereas it is my claim that Public Law 761, September 1, 1954, 68 Statutes, 83rd Congress, 2d Session repealed by implication the first mentioned Act."

Under the circumstances, the main question for consideration is whether the claimant's right to a widow's insurance benefits is barred by the fact that the wage earner died before 1940.

The essential facts in this case are simple, and apparently undisputed. The wage earner died on May 16, 1938, as alleged above, and prior to his death had earned six quarters of coverage, within the meaning of the Social Security Act as amended prior to 1954.

In view of the foregoing, the referee finds that the claimant is not the widow of a wage earner who died after 1939.

Applicable Law and Regulations

The only provision in the Social Security Act *as amended in 1954* for the payment of a widow's insurance benefits is section 202 (e) (1). This section provides that a widow shall be entitled to a widow's insurance benefits if she is "the widow (as defined in section 216 (c)) of an individual who *died a fully insured individual after 1939* . . ." (emphasis supplied), and meets several other conditions specified in the above statute. The 1954 statute clearly makes a widow's insurance benefits payable *only* to the widow of a wage earner who died "after 1939." Death after that date is a condition of entitlement, and it has not been met in this case.

In this connection the claimant's attorney is mistaken in believing that the Area Office disallowed this claim under section 202 (d) (1) of the Social Security Act of January 1, 1940. As indicated above, the disallowance was based on the Social Security Act as amended in 1954.

Apparently the claimant's attorney believes that the claimant is entitled to a widow's insurance benefits be-

cause of section 109 of the 1954 amendments, which reads as follows:

> "In the case of any individual (1) who died prior to September 1, 1950, and was not a fully insured individual (under Title II of the Social Security Act), when he died, and (2) who had not less than six quarters of coverage (as defined in such title), such individual shall, except for purpose of determining entitlement of a former wife divorced to benefits under section 202 (g) of the Social Security Act, be deemed to have died a fully insured individual."

This section is not a part of section 202 (e) which authorizes the payment of widow's insurance benefits, and which enumerates the conditions of entitlement to such benefits. This section (section 109) provides that under certain circumstances a wage earner shall be deemed to have died a fully insured individual, but it doesn't enumerate conditions of entitlement for any specific benefit. Therefore, it need not even be considered in making a determination in this case; but since the claimant's attorney has raised the question, it should be pointed out that section 109 would not, under any circumstances, be applicable to this case because it specifically applies *only* to an individual who "was not a fully insured individual (under Title II of the Social Security Act)" when he died. And this wage earner was a "fully insured individual" as that phrase is used in section 109 (a) (1) above. This fact is clearly explained in Social Security Administration Regulations No. 4, section 404.107 of which was issued for the purpose of interpreting section 109 of the 1954 amendments. Section 404.107 reads as follows:

> "An individual who died before September 1, 1950, was fully insured if he had not less than one quarter of coverage (no matter when acquired) for each two of the quarters elapsing after either 1936 or the

quarter in which he attained age twenty-one (whichever is later), and up to, but excluding, the quarter in which he either attained age 65 or died (whichever first occurred); provided that he had at least six quarters of coverage in any event

In view of the above, the referee holds that section 109 of the 1954 amendments is not applicable to this case, and that even if it were, it would not authorize the payment of a widow's insurance benefits, because the claimant is not the widow of a wage earner who died a fully insured individual *after* 1939.

It is the referee's decision that the claimant is not entitled to the benefit sought.

09:AC

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

March 14, 1957

In the case of Catherine A. Lietz, Claimant
Henry C. Lietz, Wage Earner
364-05-2901, Social Security Account No.

Mrs. Catherine A. Lietz
652 Saint Jean Avenue
Detroit 14, Michigan

Dear Mrs. Lietz:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claim for a period of disability. Your Request for Review having been denied, the referee's decision stands as the final administrative decision on your claim.

If you desire a review of the referee's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended, (section 405(g), Title 42, United States Code.) If such an action is commenced, Marion B. Folsom, Secretary of Health, Education, and Welfare, is the proper defendant.

Sincerely yours,

JOSEPH E. McELVAIN
Chairman

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 151

CATHERINE A. LIETZ, PETITIONER

v.

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division (Pet. App. 12a-15a),[1] has not been reported. The opinion of the Court of Appeals for the Sixth Circuit (Pet. 1a-4a) is reported at 264 F. 2d 311. The order of the court of appeals denying the petition for rehearing (Pet. 5a) has not been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1959. A timely filed petition for rehearing

[1] "Pet. App." refers to the petitioner's appendix in the court of appeals which constitutes the record filed in this Court.

was denied on April 9, 1959. The petition for a writ of certiorari was filed on June 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 109 of the 1954 amendments to the Social Security Act repealed by implication the requirement in Section 202(e)(1) of the Act that the wage earner must have died after 1939.

STATUTES INVOLVED

The pertinent provisions of Section 202(e) of the Social Security Act, as amended, 42 U.S.C. 402(e) and Section 109(a) of the Social Security Amendments of 1954, 42 U.S.C. 415 (Note) (1952 ed., Supp. V), are set forth in the Appendix, *infra*, pp. 11-12.

STATEMENT

On July 13, 1956, petitioner filed a claim for monthly widow's insurance benefits under Section 202(e)(1) of the Social Security Act, 42 U.S.C. 402(e)(1) (*infra*, p. 11), based on the wage record acquired by her husband before his death on May 17, 1938 (Pet. App. 2a-6a). This claim was disallowed by the Bureau of Old Age and Survivors Insurance (Pet. 6a) on the basis that petitioner did not meet the statutory test of being "[t]he widow * * * of an individual who died a fully insured individual *after 1939* * * *" (emphasis added).

Upon appeal of the disallowance, petitioner contended before the Social Security referee that Section 109 of the 1954 amendments to the Social Security Act, 68 Stat. 1052, 1084 (*infra*, p. 12), had "repealed by implication" the requirement that the death of the wage earner have taken place after 1939 (Pet. 6a). In his decision (Pet. 6a-9a), adopted as the Secretary's "final

administrative decision" (Pet. 10a), the referee held that, since Section 109(a)(1) expressly applies only when the wage earner "was not a fully insured individual * * * when he died" (*infra*, p. 12), and since the wage earner, when he died, "was a 'fully insured individual' as that phrase is used in Section 109(a)(1)" of the 1954 amendments (Pet. 8a), Section 109 was not applicable. The referee went on to hold that, in any event, Section 109 had not repealed the requirement in Section 202(e)(1) that the wage earner must have died "after 1939" (Pet. 9a).

The present action was then brought by petitioner in the District Court for the Eastern District of Michigan under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to obtain review of the administrative determination. Petitioner claimed that there was an irreconcilable conflict between the "after 1939" requirement of Section 202(e)(1), and the language of Section 109 of the 1954 amendments giving certain benefits to individuals who died prior to September 1, 1950. The district court found no such conflict and affirmed the denial of the petitioner's claim on the basis that the 1954 amendments had not repealed the requirement that the wage earner must have died after 1939 (Pet. App. 12a-15a).

On appeal, the Court of Appeals for the Sixth Circuit found no conflict between the two statutory provisions, and affirmed the denial of the claim on the sole ground that the "after 1939" requirement had not been repealed by the 1954 amendments (Pet. 1a-4a). In denying a petition for rehearing, the court added as a ground for its decision the fact that the wage earner was fully insured at the time of his death, which ren-

dered Section 109 of the 1954 amendments inapplicable to him (Pet. 5a).[2]

ARGUMENT

As in the courts below, petitioner's sole contention in this Court is that Section 109 of the 1954 amendments to the Social Security Act repealed by implication the provision in Section 202(e)(1) of the Act which conditions monthly widow's insurance benefits upon the death of the wage earner "after 1939." This Court has emphasized, however, that "when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest." *Red Rock* v. *Henry*, 106 U.S. 596, 601-602; see *Wood* v. *United States*, 16 Pet. 342, 362-363. But even leaving aside the fact that "repeals by implication are not favored" (*United States* v. *Borden Co.*, 308 U.S. 188, 198), petitioner's contention was properly rejected by both courts below. Here the very terms of the two sections, as well as their legislative background and history, demonstrate that they are not inconsistent and that Section 109 was not intended to cover the whole ground, and thus fully support the administrative view that the "after 1939" requirement survived the 1954 amendments. Accordingly, further review by this Court is not warranted.

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[2] While this holding accorded with the determination of the referee, the district court had held that the wage earner was not fully insured at the time of his death (Pet. App. 12a).

1. *Section 202 of the Social Security Act.* The provision for monthly widow's insurance benefits was made a part of the Social Security Act for the first time by Section 202 of the 1939 amendments, 53 Stat. 1360, 1364-1365. Prior to that time, a relatively small lump-sum payment was the only survivor benefit which the Act afforded. See H.R. Rept. No. 728, 76th Cong., 1st Sess., pp. 5-7.

The monthly-benefit system was to have a prospective effect only. The effective date of the amendment was set at January 1, 1940, and monthly payments were to commence at that time. *Id.* at 9, 33. Accordingly, in Section 202(d)(1) of the amendments (the predecessor of present Section 202(e)(1)), the requirements for entitlement to widow's insurance benefits were stated in the following terms: "Every widow * * * of an individual who died a fully insured individual *after December 31, 1939*, if such widow * * *." 53 Stat. 1365 (emphasis added). The origin of the requirement that a claimant be the widow of a fully insured individual who died after 1939, which petitioner contends was impliedly repealed in the 1954 amendments, is thus explained by the effective date of the benefits to which the requirement applies.[3]

This requirement for widow's benefits has been retained throughout the history of the statute and has survived the Act's various amendments. In 1950, Section 202(e) was amended in order to liberalize the application requirements in ways not otherwise material here.

[3] The same time limitation is included in the requirements for other survivors insurance benefits: child's insurance benefits (42 U.S.C. 402(d)(1)); mother's insurance benefits (42 U.S.C. 402(g)(1)); and parent's insurance benefits (42 U.S.C. 402(h)(1)).

but the "after 1939" provision remained unaffected. Social Security Act Amendments of 1950, Section 202(e), 64 Stat. 477, 484-485.[4] Similarly, in the 1954 amendments the application requirements were further liberalized, but the phrase "who died a fully insured individual after 1939" was retained. 68 Stat. 1085, 42 U.S.C. 402(e)(1). Finally, when Section 202(e)(1) was amended in 1957 (Act of August 30, 1957, Section 3(c), 71 Stat. 518, 519), the 1939 requirement was again left unchanged and therefore appears in the statute's present form. 42 U.S.C. 402(e)(1).

2. *Section 109 of the 1954 amendments.* Section 109 (*infra* p. 12), which was not passed as an amendment to any specific section of the Social Security Act, has a narrow and special application. It does nothing more than redefine the term "fully insured individual" with respect to certain wage earners who died prior to September 1, 1950. Any individual who died prior to that date, who was not fully insured when he died, and who had earned not less than six quarters of coverage,[5] is deemed by the amendment to have died a "fully insured individual."

That Section 109 was not intended to affect the requirement that the wage earner have died after 1939 is demonstrated by its legislative history. As the court below pointed out (Pet. 4a), the Senate Report, in directly referring to the problem presented by this case, described the relationship between Section 202(e)

[4] The only pertinent change was the replacement of "after December 31, 1939," with "after 1939."

[5] A "quarter of coverage" is a period of three calendar months in which the insured has had certain minimum earnings. See 42 U.S.C. 413(a).

of the Act and Section 109 of the amendments (S. Rept. No. 1987, 83d Cong., 2d Sess., pp. 4-5):

> 6. *Eligibility for benefits.*
>
> * * * * *
>
> (b) Benefits would be paid to the surviving aged widow, widowed mother, and children, or parents of any individual who died *after 1939 and prior to September 1, 1950*, and had at least 6 quarters of coverage. [Emphasis added.]

The limited purpose of Section 109 becomes even clearer upon an examination of the reason for its application to individuals who died "prior to September 1, 1950." The Social Security Act had been amended in 1950 and these amendments "greatly liberalized the requirements for insured status by granting a 'new start' whereby an individual was fully insured if he had quarters of coverage (acquired at any time) equal in number to half the calendar quarters elapsing after 1950 (rather than 1936)." *Id.* at 19. Survivors of wage earners who had died prior to 1950 could not benefit from these liberalized conditions for "fully insured" status. Such individuals were therefore retroactively given a "fully insured" status as of the time of death, provided that such death occurred prior to September 1, 1950, and provided that they earned at least six quarters of coverage. See *Hearings Before the Committee on Finance of the Senate on H. R. 9366*, 83d Cong., 2d Sess., p. 218. An additional reason for limiting the application of Section 109 to the survivors of wage earners who died before September 1, 1950, was to avoid making the benefit of this section applicable to dependent widower's insurance benefits which, under

Section 202(f) of the Act, 42 U.S.C. 402(f), are available only in cases of death after August 1950. S. Rept. No. 1987, 83d Cong., 2d Sess., p. 77.

It is also to be noted that in 1955 Congress considered a proposed amendment to Section 109 which would have given it the effect for which petitioner contends. A bill introduced as H.R. 2668, 101 Cong. Rec. 509, 84th Cong., 1st Sess., provided:

> That section 109(a) of the Social Security Amendments of 1954 is amended by adding at the end thereof the following new sentence: "Any such individual who died prior to 1940 shall, for purposes of subsections (d), (e), (g), and (h) of section 202 of the Social Security Act, be deemed to have died after 1939."

The bill was never reported out of committee and, thus, the benefits of Section 202(e)(1) of the Act were not extended to persons in petitioner's situation.

3. *Administrative construction.* Until 1951, the regulations pursuant to Section 202 stated that a widow was entitled to widow's insurance benefits only if the wage earner died after December 31, 1939. 12 F.R. 575. In 1951, a new regulation, like the 1950 amendments to the Act (see *supra*, p. 6, fn. 5), changed the date merely in form (16 F.R. 13046):

> A widow is entitled to widow's insurance benefits if she:
>
> (a) is the widow * * * of an individual who died after 1939, and who, at the time of such death, was fully insured * * *.

This regulation continued in effect until the 1954 amendments to the Act were passed.

From its inception Section 109(a) of the 1954 amendments was administratively construed as having no effect on the "after 1939" requirement. Thus, the regulations adopted in 1955, incorporating the 1954 amendment to Section 202(e)(1) with respect to filing applications, made no change in even the language of the "after 1939" requirement. 20 F.R. 2657. As a result, the language of the 1951 regulations, quoted above, is now still in effect. 20 C.F.R. 404.319.

This administrative construction is, of course, entitled to great weight. *United States* v. *American Trucking Associations*, 310 U.S. 534; *McLaren* v. *Fleischer*, 256 U.S. 477, 481. Moreover, reenactment of the statute by Congress[6] without disapproval of the accompanying regulations gives them the added sanction of implied legislative approval. *Helvering* v. *Griffiths*, 318 U.S. 371, 395-397; *Helvering* v. *Winmill*, 305 U.S. 79, 83; *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466.[7]

[6] While the 1954 amendments did not formally reenact Section 202(e), the amendments to Title II of the Act were so extensive (68 Stat. 1052-1087) that it may fairly be said that the provisions left unchanged were in effect reenacted.

[7] As noted above (*supra*, pp. 3-4), the court of appeals alternatively determined that Section 109 was not applicable because the wage earner was fully insured at the time of his death. We submit that this alternative holding was also correct and, in the event that the petition for a writ of certiorari is granted, we will urge it as an additional ground for affirmance.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General

ALAN S. ROSENTHAL,
ANTHONY L. MONDELLO,
Attorneys.

AUGUST 1959.

APPENDIX

Section 202(e)(1) of the Social Security Act, as amended, 68 Stat. 1085, 42 U.S.C. 402(e)(1), provides:

(1) The widow (as defined in section 416(c) of this title) of an individual who died a fully insured individual after 1939, if such widow—

(A) has not remarried,

(B) has attained retirement age,

(C) [42 U.S.C. (1952 ed., Supp. V) 402(e)(1)] (i) has filed application for widow's insurance benefits or was entitled, after attainment of retirement age, to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, or

(ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained retirement age,

(D) [42 U.S.C. (1952 ed., Supp. V) 402(e)(1)] is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of her deceased husband.

(E) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of her deceased husband,

shall be entitled to a widow's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: she remarries, dies, or becomes entitled to an

old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of her deceased husband.

Section 109(a) of the Social Security Amendments of 1954, 68 Stat. 1052, 1084 (42 U.S.C. 415 (Note) (1952 ed., Supp. V)), provides:

> SEC. 109 (a) In the case of any individual—
>
> (1) who died prior to September 1, 1950, and was not a fully insured individual (under title II of the Social Security Act), when he died, and
>
> (2) who had not less than six quarters of coverage as defined in such title),
>
> such individual shall, except for purposes of determining entitlement of a former wife divorced to benefits under section 202(g) of the Social Security Act, be deemed to have died a fully insured individual. Such individual's primary insurance amount shall be computed under subsection (a) (2) of section 215 of such Act. For the purpose of such computation, the provisions of section 215(d) (3) of such Act shall apply if such individual died a currently insured individual (under title II of such Act) and any other person was entitled on the basis of his wages to monthly benefits or a lump-sum death payment under section 202 of such Act; in all other cases the provisions of section 215(d) (4) shall be applicable, except that such individual's closing date shall be the first day of the quarter in which he died. In the case of any such individual, the requirement in subsection (h) of section 202 of such Act that proof of support be filed within two years of the date of his death shall not apply if such proof is filed before September 1956.

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No. 151

In the

Supreme Court of the United States

October Term 1959

CATHERINE A. LIFTZ,

Petitioner

vs.

ARTHUR S. FLEMING, Secretary of Health, Education and Welfare,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR PETITIONER

ROWLAND W. FINCH
Attorney for Petitioner
2163 Penobscot Bldg.
Detroit 26, Michigan

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Section 202(e)(1) of the Social Security Laws (42 USC 402) does not prevent payment of survivor's insurance benefits to widows under Section 109 of the 1954 Amendments, as these two statutes provide two distinct bases for determining monthly survivorship benefits under the Social Security Laws.

In 42 USC 402, monthly benefits to a widow were conditioned on death of a fully insured decedent after 1939,

while in Section 109 of the 1954 Amendments, benefits were provided in cases where the decedent died prior to September 1, 1950, not fully insured, but with six quarters of coverage. These two statutes cover entirely different situations and each should be given full credence.

We submit that the death after 1939 clause in 42 USC 402 does not prevent the payment of survivor's insurance benefits under Section 109 of the 1954 amendments (42 USC 415, note, 68 Stat. 1084, 83rd Cong. 2d Sess.), for the following reasons:

Section 109 of the 1954 Amendments was passed as a separate law, known as Public Law 761 of the 83rd Congress, 2d Session 1954. This law was incorporated in the 1954 Amendments to the Social Security Laws as Section 109.

The title of Public Law 761 was:

> "An Act to amend the Social Security Act . . . so as to extend coverage under the Old Age and survivors insurance program, increase benefits payable thereunder . . . and for other purposes."

From the title of the law it is apparent that Congress intended to create new substantive benefits for widows who could qualify under the terms of the new legislation.

Public Law 761 consisted of subparagraphs (a) and (b). Subparagraph (a) related solely to the creation of a fully insured status in individuals who died prior to September 1, 1950, who at time of death were not fully insured but who had six quarters of coverage.

Subparagraph (b) of the law made the new fully insured status "applicable only in the case of monthly benefits under Section 202 of the Social Security Act for months after August 1954, on the basis of applications filed after such month."

Section 202 of the Social Security Laws covered Old Age; child's; wife's; husband's; widow's; widower's; mother's and parent's Insurance benefits.

Through the entire presentation of petitioner's claim in the administrative agency; in the District Court; in the Court of Appeals; and in all of the governments briefs and argument, subparagraph (b) of Public Law 761 has not been cited by the Government in quoting the law, and has not been mentioned as having any pertinency to petitioner's claim. (See Respondent's Brief, Appendix p. 12)

As a result, the government has asserted that all that Section 109 did was to redefine what a fully insured individual was. This it is pointed out is what Congress provided in subparagraph (a) of Section 109.

But subparagraph (b) also is part of the new law and it is that part of the law that creates the benefits which petitioner says she is entitled to.

2. By making the new fully insured status under subparagraph (a) applicable under Subparagraph (b), in the case of monthly benefits under Sec. 202 of the Social Security laws, Congress provided a new right to widows which theretofore did not exist.

It is apparent that Congress intended to create a new class of beneficiaries under Public Law 761, distinct and apart from those previously created in 42 USC 402, in 1939, by providing a new fully insured status for those who died prior to September 1950, *not fully insured* but with six quarters of coverage, and in subparagraph (b),

made this new status applicable in the case of monthly benefits under Section 202 of the Social Security laws after August, 1954.

In framing Public Law 761, Congress did not restrict its benefits to those individuals who died after 1939. The sole restriction in the 1954 law as to date of death was that death must have occurred before September 1950. Petitioner's decedent has all of the requirements of Public Law 761 and she therefore is entitled to monthly benefits pursuant to subparagraph (b) of Public Law 761 (Section 109 of the 1954 Amendments).

3. The words in subparagraph (b) that the new status created in subparagraph (a) is "applicable only in the case of monthly benefits. . . " means that those falling within the new category of "fully insured" qualify for survivorship benefits.

In *Lupa's Estate* v. *Marcelle*, 214 Fed. (2) 942, CCA 2, the words "in the case of" were held to mean "in the category of". If this interpretation of such words is adopted, the words in subparagraph (b) ". . . in the case of monthly benefits under Section 202 of the Social Security Act . . ." would mean that monthly benefits would be payable to those who qualify under subparagraph (a) of Section 109, in the categories of beneficiaries named in Section 202 of the Social Security Act, including widows.

Congress did not by any language in Section 109 (Public Law 761) make 42 USC 402 applicable to Section 109. In other words the death after 1939 requirement in the early law was not made a part of the 1954 amendment by Congress either expressly or by implication. If Congress had intended to restrict the rights of beneficiaries under Section 109 to those who were the survivors of decedents who died after 1939 it could have done so by stating in

Section 109 that the new law would cover those who died before September, 1950 *and after 1939*. This however was not done by Congress, for the apparent reason that the two laws related to two different factual situations.

4. The fact that widow's benefits were first made available after 1939 under 53 Stat. 1360, 1364-1365, did not prevent Congress from changing the status quo in 1954.

Respondent lays great stress (its brief pages 5 and 6) on the intention of Congress when the early legislation on Social Security was enacted, to irrevocably fix 1940 as the date from which payments would commence. The view of Respondent in this respect would be correct if the Social Security System were a static instead of a dynamic piece of social legislation. Instead of being static the history of Social Security legislation shows that the objective has been, since the system was established, to extend coverage and improve benefits from time to time. This was explained to the House Ways and Means Committee during the hearings on the 1954 Amendments, by Secretary Hobby (Page 30) where she said in part:

> "During the past year, the Department conducted an intensive study . . . with the objective of developing recommendations to improve these programs to meet the present day needs of the American people more adequately."

Mrs. Hobby commented on the specific matter involved in this petition before this Court when testifying before the Senate Finance Committee on the 1954 Amendments. She said in part:

> "There are certain aspects of the bill, added by the House Ways and Means Committee . . . *These include provisions relating to eligibility of widows*, children and dependent parents *of wage earners who*

died before the enactment of the 1950 Amendments and who had the requisite number of quarters of coverage so that they would have been insured if they had died subsequently." (Emphasis added.)

We stress these statements because they show that Congress in dealing with Social Security legislation has in various amendments, broadened the base of coverage with the ultimate objective of universal coverage, and that specific provision was made in the 1954 amendments for widows in petitioner's category to give them benefits if the facts warranted payments.

In any event, since the 1954 Amendment called for payments to survivors after August 1954, such provision did not conflict with the original intent of Congress that no payments should be made prior to 1940.

Congress had the power to provide for aged widows in Section 109 of the 1954 Amendments by broadening coverage under the Social Security Act to include the few who came within the new provision.

5. **Respondents reliance on an erroneous statement in the Senate Finance Committee report** (p. 6, 7 of its brief) that death had to occur after 1939 in order that a widow could claim benefits under the 1954 amendments, is of no force. (See petitioner's petition page 5 and 6). All that respondent cites to bolster up this erroneous statement by the Senate Finance Committee is what appeared in the Committee report under the heading "Eligibility for benefits." This sub-heading was under a principal heading "Summary of principal provisions of the bill."

As we explained in our petition, there was no provision of the bill (Sec. 109 of the 1954 Amendments) requiring death to have occurred *after 1939* in order to secure the benefits of Section 109 as was indicated in the report of the Senate Finance Committee. Therefore the citation

of the Senate Committee's misleading statement should receive no credence insofar as it affects legislative intention.

6. Respondents mention of a proposed amendment to Sec. 109 involved unenacted legislation which was never released from Committee and was never presented to Congress. Petitioner submits that such unenacted legislation cannot be considered as a legislative interpretation of Sec. 109 of the 1954 Amendments. *R.R. Commission* v. *Gas Corp.*, 186 S.W. 2d 217.

7. Administrative Construction. In respect to the regulations of the Social Security Administration which were in effect until 1951 and carried forward by implication, involving the rights of a widow, and conditioning her survivorship rights on death of the husband after 1939, these regulations were correctly interpretive of the 1939 law (42 USC 402 (e) (1). But as to such unchanged regulations superseding and invalidating the express language of Congress in Sec. 109 of the 1954 amendments, that is another matter. Petitioner agrees that regulations are entitled to great weight as to any matters within the scope of the law on which they were based. But where the administrative agency adopts an interpretation contrary to the enactment of Congress, as it has done in this case by adding the death after 1939 limitation in 42 USC 402 to Section 109 of the 1954 amendments, such interpretation is not entitled to any weight.

Furthermore, this Court has held that the final construction of a statute rests with the court and not the executive department, and that an administrative construction is not controlling on the courts. *Burnet* v. *Chicago Portrait Co.*, 52 S. Ct. 275, 285 U.S. 1.

Petitioner therefore submits that the administrative determinations, and the regulations of the Social Security Administration, even if adverse to petitioner, are not compelling in determining whether the death after 1939 clause in the early law must be read into Sec. 209 of the 1954 Amendments.

CONCLUSION

For the foregoing reasons, and for the reasons contained in petitioner's petition, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

ROWLAND W. FIXEL
Attorney for Petitioner
2163 Penobscot Bldg.,
Detroit 26, Michigan

August, 1959.